Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1355

SCOTTY'S HOME BUILDERS AND GENERAL INSURANCE COMPANY OF AMERICA,

Petitioners,

versus

MATTHEW P. CUNNINGHAM AND THE INDUSTRIAL RELATIONS COMMISSION,

Respondents.

BRIEF OF RESPONDENT MATTHEW P. CUNNINGHAM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DUDLEY BURTON
Sanibel, Florida 33957
Attorney for Respondent
Matthew P. Cunningham

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OTHERS:

120-68 F.S. 7

UNIFORM APPEALS ACT 8

(F.S. 440.25(3) (b); 440.29(1); and 440.26) 9

IN THE

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BRIEF OF RESPONDENT MATTHEW P. CUNNINGHAM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Respondent, Matthew P. Cunningham, respectfully submits that a writ of certiorari should not issue to the Supreme Court of Florida to quash their orders as contended by Petitioners, because the Court below, has fully considered and adjudicated this workmen's compensation case on the merits.

OPINIONS AND ORDERS BELOW

The Respondent respectfully disagrees with the statement by Petitioners that the order of the Florida Supreme Court in this cause denied them their constitutional rights. The legal reasons therefor appear under the argument of this Respondent.

JURISDICTION

This Respondent respectfully submits that Petitioners have shown no grounds for this Court to issue a Writ of Certiorari to review the order of the Supreme Court of Florida in this cause.

QUESTION PRESENTED

Whether a Writ of Certiorari should issue to the Supreme Court of Florida to quash its adjudication of affirmance of a workmen's compensation order of the Florida Industrial Relations Commission, where said Court considered . . . "the transcript of record and briefs and argument of counsel for the respective parties" . . . (Petitioners' Brief page 35 Appendix C)

CONSTITUTIONAL PROVISION INVOLVED

This Respondent respectfully alleges that there is no constitutional provision involved since there has been no violation of any section of the Federal or State Constitution in this cause.

STATEMENT OF THE CASE

This Respondent agrees in essence with the statement of the case as set out by the Petitioners except that the

holding below of the Industrial Relations Commission of Florida was omitted. That body held that the claimant, "a paraplegic", was entitled to . . . "an Order of Compensability" under the Florida Workmen's Compensation Law. (Petitioners' Brief pages 24 and 27, Appendix B)

REASONS FOR NOT GRANTING THE WRIT

The main thrust of Petitioners' argument is the allegation that they have not had their "day in court" before the Florida Supreme Court in connection with their Petition for Certiorari before that tribunal. The record in this cause, the court decisions, and the law of the State of Florida do not support the above contention. This cause was adjudicated by the Florida Supreme Court in the same manner as several hundred other Petitions for Certiorari in workmen's compensation proceedings since the present Statute was amended in 1953. Prior to the amendment of 1953 Section (1) of F.S. 440.27 provided in workmen's compensation cases that:

> "Either party may appeal as a matter of right."

The legislature in 1953 changed this method of review and provided:

> "Orders of the full Commission entered pursuant to Section 440.25 of this chapter shall be subject to review ONLY by petition for writ of certiorari filed in the Supreme Court of Florida . . ." (Chapter 28241, Laws of Florida, Act of 1953, F.S. 440.27 sub-paragraph (1)) (Emphasis ours)

In a unanimous decision by the Florida Supreme Court construing the constitutionality of the above 1953 amendment, the Court held.

> "It is plain that reviews of decisions of the Industrial Commission may no longer be presented in an out-and-out appeal, the provisions for such relief having been repealed by the legislature, and parties dissatisfied with decisions of the commission must now find solace in the extraordinary writ of certiorari.
>
> * * *
>
> We conclude on the main point that no guaranty of organic law was violated by the act and that henceforth parties to procedure before the Industrial Commission for the settlement of claims must be content with certiorari as a means of obtaining review of the commission's decision." Wilson v. McCoy Mfg. (Fla. 1954) 69 So.2d 659.

The *Wilson* case, *supra*, is still the law of Florida today twenty-one years later and has not been reversed or modified by the Florida Supreme Court. The Court went on to hold in the *Wilson* case, *supra*, that the legal test on certiorari in workmen's compensation proceedings would be that:

> "The petitioner will carry the burden of showing that the order challenged is illegal or unauthorized or does not accord with the essential requirements of the law * * *" Wilson v. McCoy Mfg. Co. (Fla. 1954) 69 So.2d 659.

The above stated appellate test is precisely the test that the Florida Supreme Court used in the instant cause in their judicial review of the Petition for Certiorari in this case. In their Order below they held:

> ". . . the Court FINDING NO DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW, it is ordered that said petition be and

> the same is hereby denied." (Petitioners' Brief page 35 Appendix C) (Emphasis Ours)

The following per curiam decisions in workmen's compensation cases picked at random from the official reports of 1973, 1974 and 1975 indicate the above pattern of certiorari review has been followed consistently by the Florida Supreme Court.[1]

As shown in Appendix I, (Respondent's Brief page 14) the Florida Supreme Court set this cause for oral argument before five members of the Court on September 13, 1974. Each side was granted 20 minutes for oral argument on the merits. Under Appellate Rule 3.10 (e), oral argument before the Florida Supreme Court is discretionary. It has been our observation over the past 27 years that oral argument in workmen's compensation proceedings is rarely

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[1] See: *Schlosberg v. Big "K" Distributors*, 308 So.2d 113 (Fla. 1975); *Highsmith v. National Airlines, Inc.*, 308 So.2d 112 (Fla. 1975); *Santos v. City Homes, Inc.*, 308 So.2d 113 (Fla. 1975); *Balido v. Allstate Insurance Company*, 308 So.2d 112 (Fla. 1975); *William M. Schneider, Inc. v. Shifrin*, 308 So.2d 117 (Fla. 1975); *Seacoast Transportation Company v. Perez*, 308 So.2d 537 (Fla. 1975); *Downey v. General Accident & Life Assurance*, 308 So.2d 537 (Fla. 1975); *Coconut Grove Prep School v. Fisher*, 290 So.2d 63 (Fla. 1974); *Harders Construction Company, Inc. v. Sanders*, 290 So.2d 63 (Fla. 1974); *General Development Corp. v. Burge*, 285 So.2d 21 (Fla. 1973); *Munoz v. Florida Department of Commerce, Industrial Relations Commission*, 289 So.2d 792 (Fla. 1974); *Hyatt v. Southco Industries, Inc.*, 289 So.2d 737 (Fla. 1974); *Miami Herald Publishing Company v. Fernandez*, 285 So.2d 19 (Fla. 1973); *Burris v. Duricin Division*, 284 So.2d 397 (Fla. 1973); *Rivermont Corporation v. Fairbanks*, 289 So.2d 738 (Fla. 1974); *LaGrow Irrigation System, Inc. v. Stoker*, 289 So.2d 738 (Fla. 1974); *Ray Construction Company v. Turner*, 284 So.2d 395 (Fla. 1973); *John W. Thomson & Son, Inc. v. Jeziorski*, 289 So.2d 732 (Fla. 1974); *Ocean Products, Inc. v. Gordon*, 285 So.2d 618 (Fla. 1973); *Andrews v. Robinson*, 284 So.2d 394 (Fla. 1973); *Fleming v. Florida Portland Cement Division Travelers Insurance Company*, 285 So.2d 617 (Fla. 1973); *Duffey Construction Company v. Russell*, 285 So.2d 614 (Fla. 1973); *Palm Beach County Board of County Commissioners v. Sims*, 284 So.2d 393 (Fla. 1973); *Champion Mobile Homes v. Chaney*, 285 So.2d 416 (Fla. 1973); *Winter Garden Citrus Products v. Arnold*, 285 So.2d 415 (Fla. 1973); *Wiggs & Maale Construction Company v. Green*, 284 So.2d 224 (Fla. 1973); *Pennsuco Aggregates, Inc. v. Burkhalter*, 284 So.2d 393 (Fla. 1973).

granted. For the Petitioners to allege, therefore, that they have not had a constitutional guarantee of due process in the proceedings below is a mistatement of the procedural facts in this cause.

Assume arguendo that the *LeLoup* decision,[2] relied on by Petitioners in their Brief, may be used for a collateral attack in this proceeding. This Respondent does not read the decision of the Florida Supreme Court in *LeLoup* to say, as alleged by Petitioners, that a petitioner in a workmen's compensation proceeding before the Florida Supreme Court no longer has a judicial review of his case. Justice Dekle in speaking for six of the seven members of the Florida Supreme Court in *LeLoup* stated:

> "The review contemplated by Article V continues in the Florida Supreme Court but only on the basis of certiorari demonstrating a departure from the essential requirements of law, although such petition and briefs can submit and argue together the contended jurisdiction and merits without, necessarily, first submitting the matter separately on jurisdiction. Either way, the submission of the record and any testimony should now be substantially reduced.
>
> * * *
>
> IRC cases shall hereafter be reviewed by this Court upon traditional certiorari grounds based upon a departure from the essential requirements of law, rather than upon general appellate considerations." Scholastic Systems, Inc. v. LeLoup (Fla. 1975) 307 So.2d, 166.

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[2] It is legally significant that Justice Ervin, whose dissenting opinion in *LeLoup* is relied on and quoted extensively by Petitioners at pages 5, 6, 10 and 11 of their brief, voted with three other Justices in this cause to affirm the holding of compensability by the Florida Industrial Relations Commission below. (Petitioners Brief page 36 Appendix C)

Although there are 50 state workmen's compensation statutes plus a Federal Compensation Law the Petitioners have cited no workmen's compensation case from any jurisdiction to support their contention of a violation of due process in the appellate review in this cause. Petitioners in alleging that they were entitled to certiorari as a matter of right below cite cases from New Jersey and Rhode Island. The *Carlson* case cited by Petitioners at page 7 of their Brief involved a police officer that had been discharged for moral turpitude at a hearing before the Bureau at which he appeared with counsel. Thereafter a retroactive statute was passed by the legislature allowing parties to file a verified petition in proceedings similar to *Carlson's* requesting review by certiorari to a trial justice of the superior court. The question before the Supreme Court of Rhode Island was whether this statute entitled Petitioner: (1) a full review both as to the law and the facts or (2) a review by certiorari only. The Supreme Court of Rhode Island in construing this act merely held that Petitioner's procedural right was by certiorari and not by full review.

The *Gallena* decision cited by the Petitioners at page 7 of their Brief considered the interpretation of a new state constitution. The Supreme Court of New Jersey held that a one to one tie vote on a prior petition under the old constitution was merely a declination of jurisdiction of the matter in controversy and not an adjudication of the merits. Neither of the above cited cases by Petitioners are remotely related to the facts and procedures in the instant case.

Finally, petitioners alleged that Section 120.68 F.S. (Florida's new Administration Procedure Act) gives a

party in a workmen's compensation proceeding review by certiorari as a matter of right. (Petitioners' Brief page 9) Assuming arguendo that Petitioners argument is correct this offers no solace to the Petitioners. The plain wording as to the effective date of Section 120.68 F.S., supra, is January 1, 1975. (See Respondent's Brief page 16 Appendix II) The Order of Affirmance of the Supreme Court of Florida in this cause was entered by that Court on November 8, 1974 or almost two months before the section relied on by Petitioners was on the books! (See Petitioners' Brief page 35 Appendix C)

Obviously because of its newness the Florida Supreme Court has not had the opportunity to rule on the application of this section of the Administrative Procedure Act. The Court below has ruled relative to alternative methods of review in workmen's compensation proceedings in connection with the Uniform Appeals Act. In a case construing that act, enacted in 1945 by the Florida Legislature, the appellant contended that the Uniform Appeals Act provided an alternative method of appeal in workmen's compensation proceedings. In denying this contention, the Florida Supreme Court held:

> "From the history of the Workmen's Compensation Act, recounted above, it is apparent that in this particular class of cases it is the policy of the Legislature to provide a speedy method of appeal in order to secure to injured workers as quickly as possible the compensation provided for them under the Act and upon which they and their families must depend for food and shelter during the period of disability of the wage earner. To effect a change in this established and salutary policy would seem to require an express legislative mandate, directed specifically to appeals in workmen's compensation cases. This, the 1945 Uniform Appeals Act did not do."

Smith v. Fletcher Motor Sales (Fla. 1953) 62 So.2d 60.

CONCLUSION

This case has been in litigation three years, with three different sets of attorneys representing the Petitioners, at three levels. During this period this young paraplegic has been without medical or compensation benefits as provided by the Florida Workmen's Compensation Law. This law provides, as do most state acts, that proceedings shall be determined in a summary manner, that all doubts should be resolved in favor of the claimant and that technical rules or procedure should not prevail. (F.S. 440.25 (3)(b); 440.29(1); and 440.26) If any constitutional rights have been violated they are those of the Respondent, Cunningham, in this long drawn out proceeding. The Florida Supreme Court in speaking through then Chief Justice Drew stated concerning the constitutional importance of speedy benefits in workmen's compensation proceedings that:

> "Unreasonable and unjustifiable delays in the administration of justice in criminal and civil cases are condemned in section IV of the Declaration of Rights of the Florida Constitution, F.S.A. THIS SECTION OF THE CONSTITUTION IS PARTICULARLY APPLICABLE TO COMPENSATION CASES. The act is designed to afford a speedy and summary disposition of claims and we know the working man ordinarily cannot afford to wait indefinitely to receive compensation for himself and his family when he has been injured

and forced to quite work." Blount vs. State Road Dept. (Fla. 1956) 87 So.2d 507 (Emphasis Ours).

It is therefore respectfully urged by this Respondent that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

DUDLEY BURTON
P. O. Box 213
Sanibel, Florida 33957
Attorney for Respondent
Matthew P. Cunningham

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Edna L. Caruso, P. O. Drawer 3626, West Palm Beach, Florida, 33402, Attorney for Petitioners, and Mrs. Verna Martin, Industrial Relations Commission, Ashley Building, 1321 Executive Center Drive, Tallahassee, Florida, by mail, this ..... day of ....., 1975.

By: .....
Dudley Burton

APPENDIX I

CASES FOR ORAL ARGUMENT
Friday, September 13, 1974—9:30 o'clock a.m.
Five Man Court

45,447
THE STATE OF FLORIDA,
Petitioner,
versus
ROBERT MILLER WOLFF, JR.,
Respondent.

Robert L. Shevin, Attorney General
William L. Rogers, Asst. Atty. General
1350 N. W. 12th Ave., Miami
Appleton & Ernest, 6161 Overseas Highway, Marathon
Robert S. Appleton, Marathon
(MAXIMUM OF TWENTY MINUTES TO THE SIDE)

44,908
PAUL EUGENE CUMMINGS,
Petitioner,
versus
DOROTHY JUNE CUMMINGS,
Respondent.

Parker, Battaglia, Parker, Ross & Stolba,
3835 Central Ave., St. Petersburg
Michael L. Hastings, St. Petersburg
Antinori, Cohen & Thury,
406 N. Morgan St., Tampa
Ann Loughridge Kerr, 725 E. Kennedy Blvd., Tampa
(MAXIMUM OF FIFTEEN MINUTES TO THE SIDE)

45,356

SAUL GOODMAN,

Petitioner,

versus

RICHARD H. OLSEN,

Respondent.

Law Offices of Leo Greenfield
1680 N. E. 135th St., North Miami
Prunty, Ross, DeLoach & Olsen
837 City National Bank Bldg., Miami
John W. Prunty, Miami

(MAXIMUM OF FIFTEEN MINUTES TO THE SIDE)

44,546

SCOTTY'S HOME BUILDERS, ET AL.,

Petitioners,

versus

MATTHEW P. CUNNINGHAM, ET AT.,

Respondents

Earle, Yanchuck & Cooper
500 First Ave. North, St. Petersburg
James T. Earle, St. Petersburg
Burton & Burton, 1008 Concord Bldg, Miami
Dudley Burton, Miami

(MAXIMUM OF TWENTY MINUTES TO THE SIDE)

APPENDIX II

under consideration or a factually-related matter; or

(b) A party to the proceeding, or any person who directly or indirectly would have a substantial interest in the proposed agency action or his authorized representative or counsel.

(c) Nothing in this section shall apply to an advisory staff which does not participate in the proceedings or to rule-making.

(2) A hearing officer who is involved in the decisional process, and who receives an ex parte communication in violation of subsection (1), shall place on the record of the pending matter all written communications received, a memorandum stating the substance of all oral communications received, all written responses to the communication, and a memorandum stating the substance of all oral responses made and shall also advise all parties that such matters have been placed on the record. Any party desiring to rebut the ex parte communication shall be allowed to do so, if such party requests the opportunity for rebuttal within ten days after notice of such communication. The hearing officer may, if he deems it necessary to eliminate the effect of an exparte communication received by him, withdraw from the proceeding, in which case the division shall assign a successor.

(3) Any person who makes an exparte communication prohibited by subsection (1) and any hearing officer who fails to place in the record any such communication is in violation of this act and may be assessed a civil

penalty not to exceed $500 or by such other disciplinary action as his superiors may determine.

Laws 1974, c. 74-310, § 1.

Laws 1974, c. 74-310, was approved by the Governor June 25, 1974. Section 6 of the Act provided that all sections of this Act "shall take effect January 1, 1975," except §§ 11.60, 120.54(9), and 120.65, which "shall take effect October 1, 1974."

120.68 Judicial review

(1) A party who is adversely affected by final agency action is entitled to judicial review. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(2) Except in matters for which judicial review by the supreme court is provided by law, all proceedings for review shall be instituted by filing a petition in the district court of appeal in the appellate district where the agency mantains its headquarters or where a party resides. Review proceedings shall be conducted in accordance with the Florida appellate rules.

(3) The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(4) Judicial reveiw of any agency action shall be confined to the record transmitted, and any additions made thereto in accordance with subsection (7).